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Procedural guarantees and compensatory aspects in the European Court of Human Rights jurisprudence

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Abstract: This paper aims to analyze through the jurisprudence of the European Court of Human Rights (ECtHR) procedural fairness, i.e. a compensatory approach based on Art. 6, par. 1 and 3 of the European Convention of Human Rights (ECHR). The early years of jurisprudence offered us some very important ideas that put the limits and interpretations in relation to the fair trial into practice. Over time the procedural guarantees remain the same only that the interpretative method that the judges of Strasbourg occasionally offer us changes, arriving at a jurisprudential trend that even today remains full of perplexities, obscurity with wide interpretative margins which as the final objective have the greater protection of fundamental human rights especially in the sector of the fair trial as well as “the guarantee” that the ECHR offers as a super partes for the protection of human rights.

Keywords: ECtHR; ECHR; criminal procedural law; fair trial; art. 6; par. 1 and 3 ECHR; procedural guarantees.

Introduction

It is customary practice that the European Court of Human Rights (ECtHR) for years has followed a very interesting path on procedural fairness and compensation according to Art. 6 of the European Convention of Human Rights (ECHR) for fair trial. The interpretative methods retain a wide margin and degree of discretion based on equity and the need to guarantee each accused according to the interests in the criminal process, as well as the protection of the rights of the victims, the public interest and the repression of the criminal phenomena (Van Aakken, Motoć, 2018)¹.

Par. 1 and 3 of article 6 ECHR (Vogiatzis, 2022) formalizes the specific guarantees of a fairness related to the comprehensive approach and simultaneously filters the violation of an entire process and the related *accidentalia negotii* (Hoyano, 2014).

In the face of all certainty and predictability, the textual constraints, i.e. certainty and predictability (Trechsel, 2006)²,

¹ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011, par. 146: “(...) weigh[ing] in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice (...)”.

²“(...) this approach entirely neglects legal certainty in favour of equity (...)”.

form a sieve concerning the impact of violation of an overall guarantee of the relative procedure (Costa Ramos, 2016; Burić, 2018; Pivaty, 2018; Johnston, Marsh, 2022)³. It is a sophisticated approach, which follows the jurisprudence of the ECtHR being part of the holistic mechanism of overall fairness⁴. The principle of equity presents itself in a specific way and thus organizes overall equity. It is an all-encompassing criterion that gravitates towards the essence of a control that respects the guarantees of Art. 6 ECHR (Van Dijk, Van Hoof, Van Rijn, Zwaak, 2018; Mariniello, 2021)⁵. The recognition of a sentence of the ECtHR (as a sentence of conviction) is also the basis of the violation of a minimum right which causes a sort of overall unfairness in the entire proceeding. This judgment cuts off any automatism and connects the relative lesion to a certain proclamation. The judge of Strasbourg does not consider pronouncing a violation of the right to a fair trial that finds the lesion in one of the guarantees that are part of Art. 6 ECHR (Van Dijk, Van Hoof, Van Rijn, Zwaak, 2018). This happens because the ECtHR already pushes and verifies the incidence of the violation of an overall balance of the whole process (Goss, 2016). The verification of the legitimacy of a certain fault

3ECtHR, Ibrahim v. United Kingdom of 13 September 2016, par. 257. Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 118-119.

4ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011.

5ECtHR, Murtazaliyeva v. Russia of 18 December 2018. Dissenting opinion of judge Pinto de Albuquerque, par. 9: “(...) overarching criterion in the recent Court’s case-law on complaints under Article 6 par. 3 (...)”.

(defaillance) which has to do with the safeguarding of the relative minimum procedural rights inserts the relative passage in the judgment which seeks to verify the elements during a proceeding which are able to counter-balance not only the prejudices of the injury but also the compensation of the sentence, in a way to exclude minor violations⁶.

In the *Al-Khawa and Tahery v. United Kingdom* case (Widder, 2014)⁷ the ECtHR affirmed that:

“(...) the extraordinary potential of the concept of compensation, through its repeated use, seems to have built on this concept a new “theory” concerning the applicative management of procedural guarantees (...)” (Caianiello, 2017).

Thus, we have to take into consideration that with the way that the word “theory” has been used it shows that the ECtHR has emphasized a limitation of the relative necessity of the test of compensation as well as the simplification of the counter-balancing factors without explaining the limits, assumptions and functioning of the relative screen. Explaining the European judges in an analytical way, we see that they are limited to the relative exemplification of a compensatory mechanism that identifies the potential and related balancing elements as sufficient elements for the re-balancing of the violation in the

⁶ECtHR, *Murtazaliyeva v. Russia* of 18 December 2018. Dissenting opinion del giudice Pinto de Albuquerque, par. 10, “(...) the assessment of overall fairness was developed in respect of situations where it was reasonable to overlook minor infringements provided that the proceedings as a whole were fair. In such an assessment, the Court must examine the extent to which a reduction in the guarantees provided in one stage may have been offset by other guarantees (...)”.

⁷ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

concrete case. The word “theory” is by now a test that concerns the aptitude of compensation in a descriptive way of the relative application of procedural guarantees.

In the early 1980s the interest of EctHR judges was oriented towards soft positions as we have seen in the *Kostovski v. The Netherlands* case of 20 November 1989 (Goss, 2016; Mrčela, 2017; Sidhu, 2017; Kirchengast, 2019)⁸. In recent years, the development of compensatory matters has experienced a very large expansion due to the aspects of procedural fairness and the methods of managing procedural protections which are more explicit also in other sectors that have to do with Art. 6 ECHR (Caianiello, 2017; Villiger, 2023)⁹. When we talk about procedural fairness we mean the defense and the relative principle of immediacy in the way the judge has moved in the preliminary level and in the second instance degree. It is believed that over the years there has been a progressive consolidation of more transversal application towards the principle of procedural fairness.

Equity control, procedural guarantees and jurisprudential path of the ECtHR

The first jurisprudential cases that are based on Art. 6, par. 3,

⁸Par. 43: “(...) the earliest use of ‘counterbalancing’ in the context of Article 6 appears to have been in the Court’s 1989 decision in *Kostovski Netherlands* (...)”.

⁹“(...) also be noted that while the Court often refers to counterbalancing using that name, sometimes it refers to the same concepts using different language (...)”.

letter d) ECHR in the early 1980s used offset in connection with prosecutorial, pre-trial statements which are collected unilaterally by the relevant investigative bodies using terms such as pre-trial statement, out of the court statement where the defense hearing as a source of accusation it was the basis of the conditions that included the defense guarantees (Spencer, 1994). The ECtHR established the conventional legitimacy of a finding of criminal responsibility based on statements that were not based on the relevant adversarial between the parties as a fundamental right of the accused to confront the accuser (Schabas, 2015)¹⁰. The innovative path of the ECtHR was based on:

“(...) an emblematic manifestation of a different way of managing the interests at stake on the scene of the process (...). The traditional binary or “monotonic” solutions give way to a new form of guarantees in the criminal trial (...) Acknowledgment of the levitation of the complexity of the problems with which the jurisdiction has to deal today (...) moves with a view to balancing the different interests involved in individual cases (...)” (Sudre, 2021).

The essential aspect of adversarial in the process was the connection with the principle of equality of arms as a protection that puts the conventional ambit as an indispensable means of the adversarial. This motivation modulates a general balance of the procedural discipline of the ECHR and becomes the “elective carpet” for the elaborating jurisprudence of theories

¹⁰ECtHR, *Unterperinger v. Austria* of 24 November 1986. *Kostovski v. The Netherlands* of 20 November 1989.

that are developed over the years by the ECtHR itself¹¹.

In practice, the ECtHR has followed the use of cognitive material, elaborated by the relative response which acts on an evaluative and more congenial level than the logic of respect and the one-to-one rigidity of the rules of exclusion. These are some declarations of intent that in tempis have by now become points of methodology and pronouncements such as for example the related question of par. 1 and par. 3, letter d) of Art. 6 ECHR where the affirmation of the admissibility of the evidence is connected with the competence that derives from national law (Vogiatzis, 2022). Of course, there have also been important points that have always remained the same for years through jurisprudence, such as for example:

1. The golden scheme is part of the general context of the right of defense guaranteed by Art. 6 ECHR with evidence that is part of the public hearing, to an impartial judge who has to do with the case as well as the accused, defender in the relative cross-examination of the parties¹²;

¹¹“The formulation of paragraph (d) reflects the notion of “equality of arms”, an over-arching value that applies to article 6 more generally”.

¹²ECtHR, Barberà, Messegué and Jabardo v. Spain of 6 December 1988, par. 78. Kostovski v. The Netherlands of 20 November 1989, par. 41. Windisch v. Austria of 27 September 1990, par. 26. Isgrò v. Italy of 19 February 1991, par. 34. Asch v. Austria of 26 April 1991, par. 27. Lüdi v. Swiss of 15 June 1992, par. 47. Van Mechelen and others v. The Netherlands of 23 April 1997, par. 51. Lucà v. Italy of 27 February 2001, par. 39. Visser v. The Netherlands of 14 February 2002, par. 43. Craxi v. Italy of 5 December 2002, par. 85. Bracci v. Italy of 13 October 2005, par. 54. Carta v. Italy of 20 April 2006, par. 48.

2. The model “ne va pas sans exceptions”¹³, i.e. the occurrence of the relative protection of legal assets that are in conflict with the right to confrontation and the relative impossibility that concerns the respondent state (Winter, 2013)¹⁴, as well as the right/power to unavailability (Epikhin, 2018)¹⁵ and the death or serious illness of the declarant (Kostoris, 2018; Clooney, Webb, 2021)¹⁶, as results that are part of the evidence collected during the investigative phase¹⁷. The right to confrontation essentially concerns the protection of the subject who is considered as a witness needing particular protection for their psycho-physical integrity¹⁸. This context also includes the right to silence as a right of defence¹⁹, as well as “the right to life, liberty, security

13ECtHR, *Bracci v. Italy* of 13 October 2005, par. 54. *Carta v. Italy* of 20 April 2006, par. 48: “(...) les éléments de preuve doivent en principe être produits devant l'accusé en audience publique, en vue d'un débat contradictoire. Ce principe ne va pas sans exceptions (...)”.

14ECtHR, *Artner v. Austria* of 28 August 1992, par. 21. *Calabrò v. Italy and Germany* of 21 March 2002. *Haas v. Germany* of 17 November 2005. *Gossa v. Poland* of 9 January 2007, par. 55.

15ECtHR, *Artner v. Austria* of 28 August 1992, par. 21. *Doorson v. The Netherlands* of 26 March 1996, par. 79-80. *Mirilashvili v. Russia* of 11 December 2008, par. 214ss.

16ECtHR, *Bricmont v. Belgium* of 7 July 1989. *Ferrantelli and Santangelo v. Italy* of 7 August 1996, par. 52. *Craxi v. Italy* of 5 December 2002, par. 86 and 88. *Mika v. Sweden* of 27 January 2009, par. 37.

17ECtHR, *Lucà v. Italy* of 27 February 2001, par. 38 and 40: “(...) as the Court has stated on a number of occasions (...), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (...) The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (...)”.

18ECtHR, *P.S. v. Germany* of 20 December 2001, par. 28. *S.N. v. Sweden* of 2 July 2002, par. 47.

19ECtHR, *Lucà v. Italy* of 27 February 2001, par. 33 which affirms the precedent case of: *Saunders v. United Kingdom* of 17 December 1996, par. 68.

and respect for private life of the victim-witness and of the witness tout court”²⁰ and “the right to silence recognized to the next kin of the accused”²¹.

The probative effectiveness and the collections, even unilateral, of the dicta of the investigative bodies are not incompatible with Art. 6 ECHR given that the related rights of defense are not violated²². The right to an adequate and sufficient contestation of the relative statements that have to do with the interrogation of the author, since they have been taken as to the next phase of the proceeding and are not guaranteed to the accused, i.e. the cross-examination deferred²³, is an occasional type that creates relative difficulties in the definition of the own use of ubi consistam²⁴. The related provisions collected during the

20ECtHR, *Doorson v. The Netherlands* of 26 March 1996, par. 70 “(...) Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (...)”. See also in argument the case: *P.S. v. Germany* of 20 December 2001, par. 22.

21ECtHR, *Unterpertinger v. Austria* of 24 November 1986, par. 30.

22ECtHR, *Windisch v. Austria* of 27 September 1990, par. 26.

23ECtHR, *Lüdi v. Swiss* of 15 June 1992, par. 47: “(...) a general rule, paragraphs 3 (d) and 1 of Article 6 (art. 6-3-d, art. 6-1) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (...)”. See also in argument: *Isgro v. Italy* of 19 February 1991, par. 35. *Sofri and others v. Italy* of 4 March 2003. *Chifari v. Italy* of 13 May 2004. *Borghi v. Italy* of 20 June 2002.

24ECtHR, *Isgro v. Italy* of 19 February 1991, par. 35. *Sofri and others v. Italy* of 4 March 2003. *Chifari v. Italy* of 13 May 2004. *Borghi v. Italy* of 20 June 2002.

collection of evidence phase and the investigation period can also have probative value only if they have a full demonstrative use which is subject to the guarantee of an opportunity for confrontation at the genetic moment of one's deposition or later in the proceeding phase. According to the ECtHR:

“(...) this guarantee is able to rebalance the compression of the right to confrontation as enucleated in its “golden” model” (...)” (Ellison, 2002)²⁵.

3. The declarations against the author are guaranteed in the exercise of confrontation which assists in a transfer of management, even of a problematic type, which moves from the level of exclusion or admission of evaluations. In particular, the ECtHR stated that:

“(...) the circumstances impeding the perfect dialectical and equal realization of the evidentiary production were not necessarily such as to justify a cassation of the procedure de quo (...) of the impediments which in such circumstances the exercise of the rights has to deal with, imposes a limited use of untested declarative material through the exercise of the right to confrontation, in its “golden” or “inferior” guise (...) initially comes to exclude that these statements can constitute the sole or decisive evidence on which to base a conviction (see sole or decisive rule) (...). The rights of the defense are restricted in a manner incompatible with the guarantees of Art. 6 ECHR when a conviction is based, solely or to a decisive extent, on depositions given by a person whom the defendant was unable to have questioned either during the investigation or subsequently (...)” (Widder, 2014; Jackson, 2015; Paruch, 2018)²⁶.

Thus the ECtHR assumes that the admission of this type of material translates into a compression of the relative prerogatives of the defense which compromise the fairness of the procedure by seeking a relative balance on the evaluation

²⁵ECtHR, *Borgi v. Italy* of 20 June 2002.

²⁶ECtHR, *Orhan Çaçan v. Turkey* of 23 March 2010, par. 37.

level.

It is an essential nucleus, better we can say a closure of the decisive rules as a “type of downsizing of the demonstrative value of the statements unilaterally collected by the prosecution”²⁷. The related rule dating back to 1986 in the *Unterpertinger* case indicated and stated

“(...) the roots of the sole or decisive rule should be identified (...) in reality, with an explicit reference to the concept of “decisiveness”²⁸ (...) starting from the *Kostovski*²⁹ affair (...). At the basis of this jurisprudential reconstruction that is entirely centered on the notion of decisiveness, several references to the compensation mechanism already emerge, in full compliance with the global and anti-formalist approach adopted (...)”³⁰.

In *Kostovsky v. the Netherlands* case

“(...) the defense had only been able 1) to present written questions to these witnesses, without however knowing their identity and, therefore, without being able to effectively test their reliability; 2) examine, as witness de relato, the police officer who had collected the anonymous statements (...). In these circumstances it cannot be said that the handicaps under which the defense labored were counterbalanced by the procedures followed by the judicial authorities (...)”³¹. It does not explain what it means by compensatory procedure, nor does it specify at what level the counter-balancing measures should operate to consider the handicap suffered by the defense compensated, but it limits itself to inserting this notion into the grammar of the equity check (...)”³².

The expression of examine or have examined has been used to affirm the essential core of the main forms existing in the jurisprudence of the ECtHR. On the one hand the cross-examination between the parties which is a typical examination

27ECtHR, *Orhan Çaçan v. Turkey* of 23 March 2010, par. 37.

28ECtHR, *Unterpertinger v. Austria* of 24 November 1986, par. 33.

29ECtHR, *Kostovski v. The Netherlands* of 20 November 1989, par. 44: “(...) to a decisive extent on the anonymous statements (...)”.

30ECtHR, *Kostovski v. The Netherlands* of 20 November 1989, par. 45.

31ECtHR, *Kostovski v. The Netherlands* of 20 November 1989, par. 43.

32ECtHR, *Kostovski v. The Netherlands* of 20 November 1989, par. 44.

based in common law countries allows the judge to ask the relevant questions against them as is also seen in countries that have a civil law procedural system. The alternative between the mediated and immediate confrontation of the accused with the defender as well as the reference to the historical compromise between the civil law countries are characterized by the presence of a judging body with the related preliminary and investigative functions³³.

In *Doorson v. the Netherlands* case is more precise and specific the discourse of the declarative counterpoint of the anonymous testimonies (Brems, 2005; Trechsel, 2006; Veas, 2022; Harris, O'Boyle, Warbrick, 2023)³⁴. Unlike the *Kostovsky v. the Netherlands* case has been specified that:

“(...) tries to better contextualize the reference to compensation. Specifying that in the calibration of the guarantees deriving from Art. 6 ECHR it is also necessary to take into account the interests and protection needs of victims and witnesses. The Court admits that recourse to anonymity is not *ex se* illegitimate or unfair (par. 70) (...). The use of this measure has a negative impact on the defense guarantees of the accused. In these cases it is necessary to verify whether the difficulties suffered by the defense have been compensated by particular aspects of the procedure followed (par. 72) (...)”³⁵. The protection of victims and witnesses becomes the crucial junction for the examination of fairness of the relative procedure, as a counterbalance that “(...) must be considered sufficient to have enabled the defence to challenge

33ECtHR, *Šmajgl v. Slovenia* of 6 March 2017, par. 63: “(...) moreover, the Court has accepted that in exceptional circumstances there may be reasons for hearing evidence from a witness in the absence of the person against whom the statement is to be made on the condition that his lawyer was present (...)”.

34ECtHR, *Doorson v. the Netherlands* of 26 March 1996, par. 68-77. In the same spirit is also the case: *Fikret Carahan v. Turkey* of 16 March 2021. *Bajić v. North Macedonia* of 10 June 2021. *Timofeyev and Postupkin v. Russia* of 19 January 2021. *Rusishvili v. Georgia* of 30 June 2022.

35ECtHR, *Kostovski v. The Netherlands* of 20 November 1989, par. 45.

the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements (...)"³⁶.

It is understood through the brief jurisprudence just mentioned that the procedure is now compensatory and when the accused recognizes the relative protections that are able to have a similar effect deriving from the violated guarantee, the level of protection is imported as a minor fact. The relativisation of procedural guarantees risks deriving from this approach in a sentence where the judge of Strasbourg stated that:

"(...) even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defense labours, a conviction should not be based either solely or to a decisive extent on anonymous statements (...)"

reducing the potential pervasive scope of this first "version" of the counterbalancing test. It is a strong limitation that in subsequent judgments the reference to compensation is not often taken up or studied in depth (Brems, 2005)³⁷.

It is a self-restraint of the ECtHR attitude related to the use of compensations by supporting the relative use which has a limited value. In this case the compensatory approach aims at balancing the stability through accusation and defense where in the case of use it seems decisive as a declaratory contribution of the relative anonymous subjects who participate as witnesses. The non-decisive use now makes us think of some obscurities and perplexities above all the control of the relative respect of

³⁶ECtHR, Kostovski v. The Netherlands of 20 November 1989, par. 45.

³⁷ECtHR, Van Mechelen and others v. The Netherlands of 23 April 1997, par. 54, 62.

the limit of decisive use which presents itself as an evident and foundational operation for free conviction on anonymous proof of origin and as a founding motivation of the argument on other subtopics that have to do with the case at hand. A non-decisive test somehow measures the relative indispensability for one's decision (Jackson, Summers, 2013), where the notion of decisiveness is presented as fuzzy and difficult to handle according to the relative criteria that are pre-established as well as other watering down of the right of defense by comparison. In particular, in the Al-Khawaja case the evaluative weight of the principle of fairness was based on the notion of decisiveness which appeared as a concept of compensation. These references appear quite significant and in all likelihood starting from hints that the ECtHR has developed in a compensatory way in relation to the procedural guarantees³⁸.

The Al-Khawaja and Tahery v. United Kingdom case

Before the Al-Khawaja and Tahery v. United Kingdom case the principle of fairness and compensation was based on sole or decisive rules as counter-balances and in the margins of decisiveness. During the hearing, two friends are examined as witnesses. The appellant was convicted and the accused during the summing up had received instructions regarding the need to

³⁸ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 37.

evaluate the *de auditu* and pre-trial statements, i.e. unilateral collections which are acquired by the prosecution and are not taken into consideration in the adversarial process between parts. The related convictions were based on statements that came from subjects where the defense could not confront each other and the applicants turned to the ECtHR complaining of a violation of procedural fairness relating to the right of confrontation and according to Art. 6, par. 1 and 3 ECHR. The ECtHR assessed the violation of procedural fairness based on the failure to comply with the single and determining rule that the statements of the witnesses who were absent laid the basis for the conviction³⁹. The decisiveness test was based on the notion of counterbalance and argued that the violation of the right to confrontation was influenced by different factors (par. 25, 29-32, 37)⁴⁰. The argument followed in par. 37, 40 up to 48 denied the compensatory scope of the elements that are valued by the British government and the ECtHR objected

“(...) to the fact that the British authorities had partially shifted the focus to the area of compensations, until shortly before considered mere “extras” in the equity check (...). They deny the compensatory scope of the various counterbalancing, but, in doing so, they in fact accept that the equity test is channeled with greater impetus towards the counterbalancing test, continuing (...) not to specify its contours, assumptions and functioning (...) also if there has been compensation, the prohibition of the exclusive or decisive use of the statements unilaterally collected by the prosecution and released by subjects with whom the defense has never been able to deal with (par. 38)⁴¹ remains

³⁹ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

⁴⁰ECtHR, *S.N. v. Sweden* of 2 July 2002, par. 46-47.

⁴¹ECtHR, *S.N. v. Sweden* of 2 July 2002, par. 146.

unchanged. In this case and with greater precision, the judges followed the preservation of the essence of the right to confrontation compressed by the sole or decisive rule” (Hoyano, 2014).

(Follows): The Horncastle case

The ECtHR condemned the United Kingdom because of the equitable canon which respected the right to confrontation concerning “lively reactions, both in politics and in the legal debate”⁴². The profiles in contrast with the national discipline concerned both the probative use of the relative declarations of the witnesses who are absent and the relative principles of the fair trial that are declined by other judgments of the ECtHR. The intervention of the Supreme Court took the position of compatibility of the discipline that respects the principles of the ECHR. The defendants were convicted of serious crimes. Therefore, on the basis of the statements of some witnesses who were absent no application of the criteria of fair trial affirmed by the ECtHR. In the Horncastle case the Supreme Court did not consider, due to the seriousness of the situation, witness and related statements found justification in section 116 of the

⁴²ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 119-120: “(...) the Court finds these particular factors to be of limited weight since the very issue in each case is whether the trial judges and the Court of Appeal acted compatibly with Article 6 par. 1 and 3 (d) of the Convention and correctly applied the relevant case-law of this Court (...) the requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 par. 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (...)”.

Criminal Justice Act of 2003. Such statements had to do with the death of the declarant and a severe state of fear of another (Vanderpuye, 2010; Jackson, 2015; Jackson, 2019)⁴³. The Court of Appeal rejected the appellants' appeal arguing that Art. 6, par. 3 lett. d) ECHR was not an absolute right and that the balance point was found in the internal legislation which was entirely legitimate and consistent with the discipline of the ECHR. On the other hand, the Supreme Court confirmed the appellate judge's evaluative positions and rejected the convicts' appeal given that it ruled on the issue based on conventional principles and establishing a certain type of dialogue with the ECtHR.

The Supreme Court intervened on the relationship that connects the English legal system with the respect of the law of the ECHR. The British supreme judge stated that:

“(...) the duty, enshrined in the Human Rights Act of 1998, to take into account all the decisions of the European Court which appear relevant in relation to the single proceeding examined, if it normally requires the national judge to applying the principles clearly established by the European judge, does not prevent him, in some specific cases, from justifiably refusing to comply with the decisions of the ECtHR which have not adequately assessed particular aspects of the internal procedural system (...). The Criminal Justice Act of 2003 makes the application of the sole/decisive rule superfluous in the English system, since the normative guarantees offered by this legislation are largely sufficient to guarantee fairness and respect for the rights of defense conventionally protected (...). Lord Phillips, president and rapporteur judge of the decision, emphasizes the differences between English criminal procedure and civil law procedural systems and points out how the criterion of the decisive degree has been packaged in a series of sentences that exclusively involve countries of law continental where, unlike the English system, in case of use of “untested” declarations there are no specific

⁴³R. v. Horncastle [2009] UKSC, www.supremecourt.uk

procedural rules such as to guarantee respect for the rights of the defense and, consequently, fairness (...) to compensatory factors that would be able to re-balance the compression of defensive rights (...)”⁴⁴.

Instead, as far as the ECtHR is concerned, the English lords have encountered difficulties with regards to the interpretation of the “decisive” test which generates problems of an application nature given that the British criminal procedure is based on the jury trial model and the juries are required to always motivate their decisions. Another consideration concerns the effects deriving from the observance of the principles elaborated by the ECtHR where the behavior of the duty to acquit the defendants in situations where the proof of one's guilt is persuasive to produce a paradox and important for the case to use the basis of the decision.

The Supreme Court first affirmed the substantive domestic law and then the spirit of the ECHR, deeming the rigid application of the relative rule on the single, decisive and conclusive evidence incompatible. The Supreme Court has requested the intervention of the ECtHR on the matter⁴⁵. It has been stated that the argumentative apparatus of the position of the English

44R. v. Horncastle [2009] UKSC, par. 36: “(...) makes special provision for the admissibility of any material which it is contended challenges the credibility of an absent witness. The opposing party is enabled to put in evidence anything which he could have put in if the witness had been present, but he may also put in material which, if the witness had been present, could only have been asked of him in cross-examination in circumstances where his answers would have been final; this puts the challenger to that extent in a better position than if the witness is present, and is designed to help to counterbalance the absence of cross-examination of the witness in person (...)”.

45R. v. Horncastle [2009] UKSC, par. 121.

government authorities actually apply the positions of the grand chamber⁴⁶ and above the principle of equity (Dennis, 2012; Redmayne, 2012; Helferman, 2013; Liakopoulos, 2019; Liakopoulos, 2020)⁴⁷. Already in the general principles some theoretical-general elaborations are affirmed which built a relative three-step sifting which concerned: the relative justifications which prevented the guarantee of the protection granted by the ECtHR; the relationship between the evidence collected and the related breach of warranty; and the compensatory elements to the extent that it has to do with the defense and the relative vulnerability (Liakopoulos, 2019).

(Follows): Some points of analysis of the general principles mentioned above

The impediment in the examination of a declarant who represents a preliminary question with respect to the examination of the previous declarations in the evidentiary framework the ECtHR spoke for violation of Art. 6 ECHR due

⁴⁶ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011, par. 98: “(...) the Government invited the Court to adopt the approach taken by the Supreme Court in *Horncastle* and others. The Supreme Court’s judgment demonstrated that this Court’s case-law permitted a more flexible approach than the apparently hard-edged sole or decisive rule set out by the Chamber. In the light of the Supreme Court’s conclusion in *Horncastle* and others that the sole or decisive rule would give rise to severe practical difficulties in England and Wales, the Government invited the Court to make clear that the importance of the untested evidence was better regarded as one factor among others which were to be taken into account when deciding whether the proceedings as a whole were fair (...)”.

⁴⁷ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

to the absence of good reasons other than the oral examination. This opens up the path of the duty/right to examine, investigate (duty to inquire) in relation to the reasons for the absence⁴⁸.

The ECtHR is oriented on the death of the declarant and on the state of fear thus finding the causes of unlawful pressure. Acquisitive reading is thus partially affirmed, which is presented as a single form that ensures the cognitive contribution of the declarant who contributes to the verification of the indispensable results⁴⁹.

The fear of the witness to participate was examined by the judges of Strasbourg who deepened the distinction between the fear of the accused and the state of subjection in a direct way to the accused or to his own group. The ECtHR considered that the taking of evidence and previous statements by the intimidated or threatened witness constituted unique and decisive evidence against the accused⁵⁰.

Illegal conduct creates a criminal effect which is contrary to the rights of the victims/witnesses. The accused who acts in these terms is considered as an attitude of renunciation of the exercise of his right to confrontation. The state of awe is not attributable to the relative actions or threats of the accused and his accomplices but rather to the fear of the repercussions that arise

48R. v. Horncastle [2009] UKSC, par. 120.

49R. v. Horncastle [2009] UKSC, par. 121.

50R. v. Horncastle [2009] UKSC, par. 123.

during the trial examination. “The metus of the declarants in organized crime trials of the mafia type”⁵¹ according to the ECtHR is affirmed in the relevance of the form of fear which sufficiently specifies every form that has to do with the source of the hearing where the internal judge conducts the relative investigation to verify the objective bases and these that can be proven⁵².

During the evaluation of the decisive evidence, the ECtHR analyzed individually the criticisms leveled by the English authorities that have to do with the Supreme Court in *R. v. Horncastle* case⁵³. In other words, the ECtHR has evaluated the incidence of the impossibility of examining a source of evidence that has to do with the overall fairness and the relative precise weight of the untested evidence as well as the rights of the defendant which have been limited, incompatible with the forecasts envisaged by the ECHR itself⁵⁴. The guarantee of the right, according to par. 3 of Art. 6 ECHR, is framed in the context of an overall examination relating to procedural fairness. The ECtHR reported the factors, the way and the legal guarantees that are applied according to the measures that have to do with the defence, as well as the procedural opportunities to compensate for the handicaps where the trial judge has

51R. v. Horncastle [2009] UKSC, par. 123.

52R. v. Horncastle [2009] UKSC, par. 124.

53R. v. Horncastle [2009] UKSC, par. 129-130.

54R. v. Horncastle [2009] UKSC, par. 143.

conducted the proceedings as a whole⁵⁵. Issues in connection with procedural fairness are handled flexibly by preferring an approach that is not uncompromising with the interpretation of the pre-established rules of the ECHR. The references to the ECtHR support the thesis where the application reason is the rigid and old use of the sole/decisive rule. Of course in the past we have had very rigorous sentences where the Grand Chamber followed a not so correct orientation which transformed the rule under examination into an indiscriminate instrument and in contrast with the tradition that the ECtHR managed the control of the overall fairness of the proceeding as a method which it questioned the balance of interests at stake in the process, i.e. the defence, the victim, the witnesses, public interests, the efficient administration of justice⁵⁶. The decisive commitment of the statements collected that have to do with the violation of the right to confrontation does not autonomously translate the violation of Art. 6 ECHR. The examination of the decisive evidence and the statements collected which have to do with the violation of the right to confrontation are not connected with the relevant evaluation steps of the equity check. The elements in dispute have nothing to do with the exclusive or decisive evidence on which the conviction is based. Procedural fairness

⁵⁵R. v. Horncastle [2009] UKSC, par. 144.

⁵⁶ECtHR, *Lucà v. Italy* of 27 February 2001, par. 40. *R. v. Horncastle* [2009] UKSC, par. 146.

does not stop the recognition of unfairness and paves the way for the third and final step relating to the judgment of fairness.

The last step has to do with the compensations that have introduced the major innovations. The logical-prescriptive step is concluded through the discussion on the sole/decisive rule and is introduced to an evaluative step of the equity control. The decisive use of the related pre-trial statements does not automatically violate Art. 6 ECHR. The Grand Chamber states that:

“(...) a conviction is based exclusively or decisively on this type of evidence. It is duty of the Court to subject the proceedings to the most careful review (must subject the proceedings to the most searching scrutiny), since the implicit dangers in the assumption of this “spurious” evidence are such as to require adequate compensatory factors, such as (...) the existence of strong procedural guarantees (...). The crucial point of the question is, therefore, to verify whether there are sufficient counterbalancing factors, including the existence of measures capable of ensuring an adequate and correct assessment of the reliability of the aforementioned tests (...)”⁵⁷.

The compensations could help the vulnus caused to certain defensive rights that were firm in the event of the outcome of the compensation, where the ban on the use of untested evidence symmetrically overturns the related reasoning. A piece of evidence is the decisive basis for a conviction according to the appropriate operation of set-offs. The analysis of the compensatory procedural measures that are in force in English law⁵⁸, such as the mandatory nature of the exceptions, the so-called gateways allow the acquisition of untested evidence.

57R. v. Horncastle [2009] UKSC, par. 147.

58R. v. Horncastle [2009] UKSC, par. 148-150.

One's admission satisfies the interests of justice, as does the power/duty of the trial judge to consider the difficulties faced in defending the dicta of a witness who was absent. The possibility of producing evidence to the contrary concerned the credibility and coherence of statements of an accusatory nature or of their author where the canons of admissibility allow the trial judge to stop the proceedings against the accused, where the evidentiary system puts the evidence in consideration from a convincing and compromising point of view to the validity of a conviction.

Returning to the Al-Khawaja case⁵⁹, the ECtHR:

“(...) rules out the violation of the Convention by holding that the impossibility for the defense to confront the main prosecution witness was not only justified by the latter's death, but also sufficiently compensated (...). The paragraph dedicated to the evaluation of the counterbalancing factors⁶⁰ opens with the mention of the interests of justice, considered undoubtedly (obviously) in favor of the admission among the evidence of the controversial statements (...). Counterbalancing factors have been identified in the following elements: the precise documentation of the statements made to the police by the victim; the corroboration of the same by the de relato testimonies of the two friends in whom the victim had confided; the strong similarity with the description of the aggression given in the cross-examination by the second victim (...)”⁶¹.

According to the Tahery case⁶², Art. 6 ECHR and related statements by the absent witness justify intimidations that are directed at sufficient counterbalancing factors.

⁵⁹ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, parr. 153-158.

⁶⁰ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, parr. 156.

⁶¹ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 156.

⁶²ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, parr. 159-165.

The “compensatory” tests that we have seen in the cases analyzed in the previous paragraphs is a revirement that goes beyond the sifting that the ECtHR carries out in the notion of decisive proof(s) and to that of compensation where the circle line of equity is a destination that remains always in the text of the ECHR and not an introductory refrain of the relevant judgments of the European judge as a reference to the concept of delineation of the permitted agreement always tolerated according to the senses of Art. 6 ECHR.

The Schatschaschwili v. Germany case

The only decisive proof remained the principle of compensation in the case under investigation (Vuille, Lupària, Taroni, 2017; Sutherland, 2017). The need for nomophilachy has pushed towards pronouncements that confirm the complexity of the matter treated and thus betray the incompleteness and lack of clarity of the new path followed by the Al-Khawaja and Tahery v. United Kingdom case. When applying the aforementioned criteria, the Court feels the need to focus attention on the degree of cogency of each and on the relationship between them, thus ending up redefining, once again, the conditions for its action (Laird, 2017). The ECtHR was based on the opportunity to proceed beyond the fairness screening as well as the verification of the reasons for justifying the application of a guarantee that

gave a negative result.

The Grand Chamber specified:

“(...) its tendential opposition to categorical answers, that from the lack of good reasons for the absence of the witness in the trial it is not possible to automatically infer the unfairness of the whole proceeding (...)”⁶³.

The ECtHR has gone beyond the logic of the rigorous application of the sole or decisive rule of 2011 and against the automatism of a limiting circumstance of equity and the relative occurrence of the violation of the spirit of the ECHR especially at the evaluation moments of its own fuzzy reasoning. The unfairness of the procedure has not been affirmed as well as the guarantee that is provided for by the ECHR as de facto is not applied and the good reasons of the protection in itself suitable for finding the relative judges of a violation of the principles of equity have not been taken into consideration. Within this spirit, the ECtHR states that:

“(...) the examination of the compensatory elements (one of the Al-Khawaja criteria of case) must be carried out not only in cases where the decisiveness of the indicted evidence is proven and evident, but also when the effective impact of this on the conviction of the judge is uncertain (...). It cannot be denied that this circumstance increases the level of protection in the new system, since it is required that the limitation of the prerogatives of the defense be compensated even when it is not certain that the evidence was actually “decisive”, avoiding the risk that the doubts pass the fairness check only because of the difficult calibration of the notion of decisiveness. The extensive application of the counterbalancing test to doubtful cases (...) seems to represent an implicit admission of the impossibility of constructing

⁶³ECtHR, *Schatschaschwili, v. Germany* of 15 December 2015, parr. 112-113: “(...) the lack of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness, and one which might tip the balance in favour of finding a breach of Article 6 parr. 1 and 3(d) (...)”.

a solid and satisfactory control of fairness on the “determinant test” (...) ⁶⁴. The relationships that exist between the three different moments of evaluation of the new assessment of fairness, are examined by the Court individually, one by one” ⁶⁵.

The ECtHR in the sector of the counterbalances reaffirmed the relative compensations that allow a fair assessment that has to do with the reliability of the untested evidence, given that:

“(...) The conventional judge seems to have realized the inherent uncertainties in the evaluation of the compensatory measures and, consequently, while avoiding an exhaustive list, illustrates some of the main compensatory elements (...) (Ažubalyte, Titko, 2022) ⁶⁶ and subsequently clarifying that these are divided into three “macro-categories” (...) ⁶⁷. They refer, respectively: 1) to the caution of national courts in handling the declarations of absent witnesses; 2) the existence of probative elements capable of corroborating (corroborative evidence) the statements unilaterally collected by the prosecution; 3) to those procedural measures that are able to balance the defensive deficits caused by the use of evidence formed outside the adversarial circuit (...) ⁶⁸. From this last point of view, the possibility of asking questions to the witness is noted, if not during the trial where the questions can also be formulated indirectly (...) at least in the investigative phase, above all where there is the risk of future unrepeatability (...) ⁶⁹. Furthermore, consideration must be given to the defendant's opportunity to

⁶⁴ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 114-116: “(...) given that the Court’s concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant’s conviction but also in those cases where, following its assessment of the domestic courts’ evaluation of the weight of the evidence, it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair (...)”.

⁶⁵ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 119. Ben Moumen v. Italy of 23 June 2016.

⁶⁶ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 125 and 131. Murtazaliyeva v. Russia of 18 December 2018.

⁶⁷ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 145 and 160.

⁶⁸ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 129.

⁶⁹ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 130.

provide his own version of what happened and to challenge the credibility of the evidence against him (...)”⁷⁰.

The placement between compensatory measures and the possibility of asking questions to the declarant during the investigations are in any case “liable to make the untested nature of the declaration acquired disappear”⁷¹. The past system of automatism in relation to fairness the procedural is in any case a procedure that saves the course of the investigations guaranteed to the opportunity in comparison. The substantial equalization of the debate confrontation with the occurrence in the preliminary phase allows for a more rigorous control given that the contradictory established during the investigations is in itself sufficient excluding the violation of article 6 ECHR (Villiger, 2023). We have not noticed if there are other ways that have to do with the assessment of the evidence collected and the related responsibility of an individual since there is no compensatory principle in every case under investigation. The considerations seem to do with the opportunity that the accused provides for his own version of the facts and the relative doubts that have to do with the credibility of the key witness to the case which is never examined. Any other considerations go into the operation of the compensation principles. The ECtHR has identified as a compensatory principle the fact that the defense is already aware of its statements even in the absence of a direct confrontation. In

⁷⁰ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 129.

⁷¹ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 129.

this case, the ECtHR specifies that “the picture is already full of critical issues”⁷².

In our opinion, the identification of compensatory factors seek not only to evolve but also to broaden the relative recourse to compensations given that it is deemed appropriate that the reasons guaranteed to the right to comparison still do not clarify this type of examination. The ECtHR has limited itself to exemplifying the relevant balancing elements so the level of compensation is necessary and sufficient to preserve the principles of fairness as well as the way to ascertain it. The European judges persevere in the orientation of the compensations and the vulnus caused to the relative defensive rights thus guaranteeing the reliability of the untested evidence. It is a macro category that explicitly finalizes the defense in an authentic way due to the loss of the opportunity to examine the source of the accusation in the relative cross-examination.

From Salduz v. Turkey to Ibrahim v. United Kingdom case.

Assistance of a defender before the procedural phases

The right to the assistance of a lawyer before the procedural phase is also part of Art. 6, par. 3, letter. c) ECHR (Caianiello, 2017). The assistance of a defender is part of a fertile ground for the development of procedural fairness (Fifkak, 2018; Ivičević

⁷²ECtHR, Schatschaschwili, v. Germany of 15 December 2015, par. 132.

Karas, 2019; Brodersen, Glerum, Klip, 2022)⁷³. Investigative interrogations are fundamental guarantees for the right against self-incrimination (Escobar Veas, 2022). The presence of a defender has an instrumental nature that has to do with the correctness and compliance with a public interest procedure (Harris, O'Boyle, Warbrick, 2023)⁷⁴. The ECtHR has finalized the extension of this right as an integral part of the procedural activity (Jackson., Summers, 2012; Giannouloupoulos, 2019; Sakowicz, 2021)⁷⁵. An interpretative evolution is represented by the judgment in the *Salduz v. Turkey* case as an expansive trend that has to do with the protection in question and on the basis of the incidence of the procedural phase on the trial one:

“(...) article 6-especially paragraph 3 thereof-may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (...) (Celiksoy, 2019; Sakowicz, 2021)⁷⁶ national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation (...)”⁷⁷.

Any limitation on defensive assistance in the early preliminary stages of criminal proceedings must be suitably circumscribed

⁷³ECtHR, *Sejdovic v. Italy* of 1st March 2006, par. 91. *Poitrimol v. France* of 23 November 1993, par. 34. *Dembukov v. Bulgaria* of 28 February 2008, par. 50: “(...) one of the fundamental features of a fair trial (...)”.

⁷⁴“(...) watchdog for the procedural regularity, both in the public interest and for his client”.

⁷⁵ECtHR, *Salduz v. Turkey* of 27 November 2008.

⁷⁶ECtHR, *Salduz v. Turkey* of 27 November 2008. *Imbrioscia v. Swiss* of 24 November 1993, par. 36.

⁷⁷ECtHR, *Salduz v. Turkey* of 27 November 2008, par. 52.

and its application strictly limited in time⁷⁸. The European judge prepares a sort of vademecum⁷⁹ capable of guaranteeing the essence of the right in question and modeling control over compliance with the latter through a two-phase assessment, stating that: - for the right to a fair trial to remain sufficiently “practical and effective” (Sidhu, 2017), art. 6 requires that, as a rule, access to a lawyer from the very first questioning of a suspect, unless it is demonstrated, in the light of the particular circumstances of each case, the existence of compelling reasons.

To limit this right,

“(…) even where such justified and compelling reasons for refusing access to a lawyer exist, the restriction of the right in question must in any case not unduly prejudice the rights of defense referred to in art. 6, specifying that the rights of the defense will be in principle irreparably violated when, in the face of the non-recognition of the defensive assistance during the investigative interrogation, the statements made by the suspect in that session will be used for his conviction at the outcome of the trial (…)”⁸⁰.

The Strasbourg judges recognize the right of defense in the procedural phase in front of justified reasons by introducing a clear probative limit to the declaratory material that is collected

⁷⁸ECtHR, *Salduz v. Turkey* of 27 November 2008, par. 54.

⁷⁹ECtHR, *Salduz v. Turkey* of 27 November 2008, par. 55: “(…) the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” (see paragraph 51 above), Article 6 par. 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction-whatever its justification-must not unduly prejudice the rights of the accused under Article 6 (…) the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (…)”.

⁸⁰ECtHR, *Salduz v. Turkey* of 27 November 2008, parr. 56-57.

as defense protection. A limit that is aimed at guaranteeing the relative overall limit that:

“(...) is not already violated when the suspect is deprived of the defender, but only if what in that context becomes evidence against him (...)”.

A full-fledged accusation has mostly yet to be formulated, and there may be compelling reasons for delaying contact between defender and suspect. Even in these cases, however, the rationale underlying the right to a defender is guaranteed in its hard core by a clear, precise and automatic “prohibition” (Soo, 2017), for which any indication collected in the absence of the defender cannot be transformed into load test (Pinar Ölçer, 2013; Soo, 2017; Sakowicz, 2021)⁸¹.

As can be understood, the usefulness of the probative use contra reum entails the unfairness of the proceeding without it being necessary to examine the relative proceeding and creating the space for the relative compensatory approach of this guarantee. The examination of compelling reasons coincides with the old tests of the Al-Khawaja case. i.e. elements based on the denial of the right to comparison which does not assess the impact of

⁸¹ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011: “(...) in cases concerning the withholding of evidence from the defence in order to protect police sources, the Court has left it to the domestic courts to decide whether the rights of the defence should cede to the public interest and has confined itself to verifying whether the procedures followed by the judicial authorities sufficiently counterbalance the limitations on the defence with appropriate safeguards. The fact that certain evidence was not made available to the defence was not considered automatically to lead to a violation of Article 6 par. 1 (see, for example, Rowe and Davis v. the United Kingdom [GC], no. 28901/95, ECHR 2000 II). Similarly, in Salduz v. Turkey of 27 November 2008, par. 50), the Court reiterated that the right to legal assistance, set out in Article 6 par. 3 (c) was one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 par. 1 (...)”.

the defaillance on the overall fairness through reference to compensations. The consolidation of the “Sladuz rule” in jurisprudence has played an important effect in national legal systems (Billing, 2016; Hodgson, 2020)⁸², as well as the related Directive 2013/48/EU (Soo, 2017) where the ECtHR has decided to overturn the previous coordinates by introducing clear and precise references to compensations (Celiksoy, 2019)⁸³. In *Ibrahim v. United Kingdom* a case for terrorism, the Strasbourg judge questioned without the assistance of a defender and based on statements made which were collected during the various interrogations. Perhaps it is not the only case in every prosecution of the Member States of the ECHR, and the zeal of judge for terrorist crimes too striking to arrive at a confirmation of the facts that the police already knew by excluding principles such as violations of Art. 6 ECHR and as reasons that have compressed the right to a defender:

“(...) no undue prejudice had been caused by the admission of the statements at trial having regard in particular to the counterbalancing safeguards contained in the legislative framework, to the trial judge’s rulings and directions to the jury and to the strength of the other evidence in the cases (...)”⁸⁴.

The first reference to the principle of procedural fairness identifies the internal procedural legislation by examining the very rigorous conditions for legitimizing the right, i.e. the power

⁸²ECtHR, *Dayanan v. Turkey* of 13 October 2009; *Pishchalnikov v. Russia* of 24 September 2009, par. 73 and 81.

⁸³ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016.

⁸⁴ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 235.

of participation of a defender as counter-balancing factors capable of protecting the fairness of the proceedings. The ECtHR with an authentic interpretation has forced the meaning of the Salduz rule stating that it includes a double step, i.e. the evaluation of the compelling reasons to justify the denial of defensive assistance in the phases of the proceedings and in a second step it had to verify that the statements made without the presence of a defender causes a problem of overall fairness of the whole proceeding⁸⁵.

The absence of compelling reasons does not amount to a definitive determination of the violation of Art. 6 ECHR. It must be assessed that the proceeding as a whole, i.e. a whole test, where the specific rights in par. 3 of Art. 6 ECHR do not represent the relative reconstruction of the grand chamber but only some aspects of the relative right to the principle of procedural fairness⁸⁶. The principles contained in the Salduz judgment deal with a revirement that respects the use of statements and the violation of procedural fairness (Soo, 2017).

Again the ECtHR, as we have seen in *Al-Khawaja and Tahery v. United Kingdom*, “moves away” from the automatism of

⁸⁵ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 257.

⁸⁶ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 262: “(...) the Court accordingly reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 par. 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (...) the absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention (...)”.

assessing the impact of compression on the overall fairness of the proceedings (as a whole test). In the *Schatschaschwili v. Germany* case has tolerated minimum guarantees that are devalued to simplifications of mandatory fairness that are violated even in the absence of the relevant reasons. The transition from the leading cases on the subject that we have seen so far is evident in the *Ibrahim* case (Caianiello, 2017). This influence deserves a second pass of the test which evaluates the impact of the absence of the defender on the overall fairness of the proceedings. The ECtHR stated that the impact of the defaillance is necessary to report some elements:

“(...) “(a) whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity. The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair; b) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use; c) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion; d) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found. e) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified; f) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case; g) whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions; j) the weight of the public interest in the investigation and punishment of the particular offence in issue; i) other relevant procedural safeguards afforded by domestic law and practice (...)”⁸⁷.

This compensatory value has to do with the reference to the

⁸⁷ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016.

guarantees that are recognized in domestic law, i.e. elements of a list that assumes a compensatory function that counterbalances the different elements that show a certain similarity with emergencies that the counter-balancing factors are identified as we have seen in the Al-Khawaja and Schatschaschwili cases.

These are:

“(...) the reference to the indications given by the judge to the jury (point h)⁸⁸, the reference to the possibility of testing the reliability of the evidence collected in the absence of the defender in any case (point d)⁸⁹ (...) the reference to the possibilities guaranteed to the defense to challenge the statements made in violation of the conventional guarantee (point c)⁹⁰. (...) The reference to the interests of a state nature to an efficient repressive activity of criminal phenomena (point i) seems to unite the rulings in question (...)”⁹¹.

From Ibrahim v. United Kingdom case the ECtHR followed a compensatory approach within the framework of the holistic assessment that characterizes the judgment of procedural fairness. The right to confrontation according to Art. 6, par. 3, letter c) ECHR does not rationalize or explain the concrete action. The use of compensatory logics has to do with heterogeneous and non-exhaustive references from factors to be taken into consideration and in the assessment of overall fairness. The judge of Strasbourg leaves margins of obscurity

⁸⁸ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 150. Schatschaschwili, v. Germany of 15 December 2015, par. 126.

⁸⁹ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 147 and 156. Schatschaschwili, v. Germany of 15 December 2015, par. 125.

⁹⁰ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 148. Schatschaschwili, v. Germany of 15 December 2015, par. 131.

⁹¹ECtHR, Al-Khawaja and Tahery v. United Kingdom of 15 December 2011, par. 118 and 156. Schatschaschwili v. Germany of 15 December 2015, par. 101.

and uncertainty regarding the control of equity (Helfer, 2020; Clooney, Webb, 2021)⁹².

Lastly, in the *Beuze v. Belgium* case the ECtHR dealt with the right of the defender speaking of equity control only if appropriate⁹³ reiterating what was said to Ibrahim, i.e. on specific rights that do not represent an end but a function that guarantees overall equity of the proceeding⁹⁴.

(Follows): The right to the principle of immediacy

The principle of immediacy that is connected with the immutability of the judge is highlighted in the preliminary hearing. It was not precisely linked in the text of the ECHR but was implicitly inserted into the notion of a fair trial by the judges themselves. We recall the *P.K. v. Finland* case, where the ECtHR stated that:

“(...) important element of fair criminal proceedings is also the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Such a principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanor and credibility of a witness may have important consequences for the accused (...)”⁹⁵. The need to guarantee

⁹²ECtHR, *Zherdev v. Ukraine* of 27 April 2017. *Simeonovi v. Bulgaria* of 12 May 2017. *Farrugia v. Malta* of 4 June 2019.

⁹³ECtHR, *Beuze v. Belgium* of 9 November 2018, par. 121, “In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 par. 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases (...)”.

⁹⁴ECtHR, *Beuze v. Belgium* of 9 November 2018, par. 122, “(...) those minimum rights guaranteed by Article 6 par. 3 are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (...)”.

⁹⁵ECtHR, *P.K. v. Finland* of 9 July 2002. *Kostovski v. The Netherlands* of 20

contiguity between the formative genesis of the test and the judge is appreciated “above all as a privileged place of defense, not so much as an essential condition for an accurate assessment by the judge (...)”.

In cases of change of the judge or of the judging panel, the general rule would impose the recourse to renewal of the investigation⁹⁶.

From the settings just referred to we understand the dispute before the judges of the ECtHR in *subiecta materia* where in the abstract we note the importance of the principle of immediacy and the ECtHR has manifested a violation of Art. 6 ECHR through the judge instructing and deciding on the relevant case. This is a compensatory reasoning as the source of the change of the judge who renews the relative investigation.

“(...) Measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court (...)” (Mariniello, 2021; Morão, Tavares da Silva, 2021; Paulesu, 2022)⁹⁷.

Without the reference of an explicit case we cannot understand if these measures are not compensatory or do not respect the

November 1989, par. 43: “(...) each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability. The courts admittedly heard evidence on the latter point (see paragraphs 17 and 19 above) and no doubt-as is required by Netherlands law (...) they observed caution in evaluating the statements in question, but this can scarcely be regarded as a proper substitute for direct observation (...)”.

96ECtHR, *P.K. v. Finland* of 9 July 2002: “(...) normally a change in the composition of the trial court after the hearing of an important witness should lead to the rehearing of that witness (...)”.

97ECtHR, *Cutean v. Romania* of 2 December 2014, par. 61. *Škaro v. Croatia* of 6 December 2016, par. 24.

immediacy limitation. The use of compensation finalizes and ensures the understanding of the related evidence by the judge and the defense for the lack of recognition of the possibility of examining the related texts to the investigating judge who decides. The objective or subjective key of immediacy is difficult to understand the witness examination and the failure to resume the means of evidence where the measure is limited and credibility is not contested.

Within this context we report the *Famulayak v. Ukraine*⁹⁸ and the *Chernika v. Ukraine*⁹⁹ where the ECtHR addressed the issue of immediacy.

“(...) The new judge, in the absence of renewal of the preliminary investigation, will judge the defendant on the basis of a mere documentary evaluation of the sources of evidence already acquired in the judgment that led to the annulment (...)”¹⁰⁰. Although the question raised mainly involves the canon of immediacy, the protection of the right to confrontation is also implied to a certain extent. It follows, therefore, that it is necessary to refer to the jurisprudence on the matter of right to confrontation (...)”¹⁰¹.

Of course, the cases just mentioned take us away from the counterbalancing test that we saw in the *Al-Khawaja* and *Schatschaschwili* cases. Moreover, in the *Famulayak* case, the

⁹⁸ECtHR, *Famulayak v. Ukraine* of 23 March 2019.

⁹⁹ECtHR, *Chernika v. Ukraine* of 12 March 2020: “(...) the *Al-Khawaja* and *Schatschaschwili* principles can also be applicable where the witnesses do appear before the trial court but procedural irregularities prevent the applicant from examining them. They can also serve as guidance where the relevant issue is not the non-appearance of witnesses at the trial but rather the modalities of their cross-examination which may limit the rights of the defence (...)”.

¹⁰⁰ECtHR, *Chernika v. Ukraine* of 12 March 2020, par. 53. *Cherpion v. Belgium* of 9 May 2017.

¹⁰¹ECtHR, *Chernika v. Ukraine*, par. 54. *Ürek and Ürek v. Turkey* of 9 December 2019.

judges of Strasbourg ruled:

“(…) that the compression of the immediacy caused by the impossibility of taking the evidence before the referring judge was compensated by the possibility for the accused to examine the texts in the previous judgment (…) without undermining the overall fairness of the proceedings (...)”¹⁰².

In the *Chernika v. Ukraine* case it reaffirmed the same positions that we saw in the *Famulayak* case thus proclaiming the notion of overall fairness where the ECtHR formulated abstract judgments and spoke to us for the harmonization of the legal systems of the Member States¹⁰³. As regards procedural fairness among the counterbalancing factors, the elements we have are concentrated on the possibility of providing the “real” version of the facts. Other related evidence is able to reinvigorate those assumed in the presence of the judge who is called to decide. The accused has enjoyed the related opportunity in relation to the witnesses who call the related investigation or in a previous judgment¹⁰⁴. This is a sporadic use, unaware of what follows regarding the compensatory tests. Certainly the relative verification of the evolution of the jurisprudence of the judges of Strasbourg remains and the relative interweaving between immediacy and comparison as a unique representation of its kind¹⁰⁵.

¹⁰²ECtHR, *Famulayak v. Ukraine* of 23 March 2019, parr. 43-44.

¹⁰³ECtHR, *Chernika v. Ukraine* of 12 March 2020, par. 56.

¹⁰⁴ECtHR, *Chernika v. Ukraine* of 12 March 2020, par. 67.

¹⁰⁵ECtHR, *Dan v. The Republic of Moldova* n. 2 of 10 November 2020.

Khaslev v. Estonia and Dan v. Republic of Moldova no. 2. Renewed hearing investigation

Already in *Al-Khawaja and Tahery v. United Kingdom* case the ECtHR showed us the incidence of immediacy based on the principles of the ECHR (Neri, 2022)¹⁰⁶. The structure of the judgment in the appeal has undermined its nature but in cases of re-evaluation the evidentiary system acquires new paths:

“(...) the general principle has prevailed according to which a second instance jurisdiction to which a question is referred not merely in iure, but which pertains to the examination of the guilt of a defendant cannot decide without a direct appreciation of the evidence (...) to declare the unfairness of the proceeding every time the appeal judge reforms the acquittal sentence without renewing-and therefore re-evaluating in a mere paper form-the declaratory contributions on which this was concretely based (...)”¹⁰⁷.

In overturning cases that have to do with the acquittal of conviction the ECtHR:

“(...) offers a solution not based on its classic floue logic. The “guarantees-means of compensation” logic is irrelevant here: the renewal of the trial is not intended as compensation for the impairment of a specific right of the accused, but is invoked as a preventive tool necessary to safeguard the fairness of the trial (...)”¹⁰⁸.

It is a new course that legitimizes the compensatory mechanisms (Caianiello, 2017)¹⁰⁹. The transition from automatism to a

¹⁰⁶ECtHR, *Dan v. Moldova* of 5 July 2011. *Manolachi v. Romania* of 5 March 2013. *Hanu v. Romania* of 4 June 2013.

¹⁰⁷ECtHR, *Manolachi v. Romania* of 5 March 2013.

¹⁰⁸ECtHR, *Hanu v. Romania* of 4 June 2013.

¹⁰⁹“(...) with regard to *Kashlev*, at least, one could observe that the decision is consistent with the need to harmonise the approach to the matter of admissibility of evidence at trial and at the appeal stage. In fact, it would be somehow uneven to keep a flexible approach for the trial, and at the same time, be rigid in the appeal stage. After *Al-Khawaja and Tahery*, in fact, violations of Article 6 echr are never automatically acknowledged, even when the conviction is based on a sole or decisive witness’ statement never challenged by the defendant in the entire proceedings: Why should it be different at the appeal stage? A jurisprudence firmly requiring to renovate a testimony when the Court of Appeal wants to convert an acquittal into a conviction

complete control of overall fairness also favors compensation and the relative guarantee of the principle of fairness in the sector of renewal of the preliminary investigation in appeal (Kostoris, 2018)¹¹⁰. We recall in this context the Kashlev v. Estonia case as a new light of the opposite logic to the Dan, Manolachi and Hanu cases. In particular, in the Kashlev case it is stated that:

“(...) the non-renewal of the taking of evidence and, a whole series of guarantees had in any case been applied aiming at excluding an arbitrary decision of the appeal process and, therefore, the unfairness of the proceeding¹¹¹ (...). The judges included: 1) a sort of reinforced motivation which is suitable for giving a detailed account of the reasons which led the appellate judge to depart from the first instance decision even in the absence of the renewal; 2) the possibility of appealing against the appeal sentence before the Supreme Court 3) the possibility of having in any case been able to examine the sources of evidence before the judge of first instance”¹¹².

In Dan v. Republic of Moldova no. 2 case the ECtHR dealt with the renewal of the appeal¹¹³. In the first judgment Dan v. Republic of Moldova issued in 2011, the ECtHR:

“(...) had found the violation of procedural fairness since the internal judges of the second instance had sentenced the appellant by basing the overturning of the first instance acquittal sentence on the mere documentary re-evaluation of the declarative evidence, without ordering the re-hearing of key witnesses

could be considered disproportionate and inconsistent with the holistic approach always kept by the ECtHR, when in the specific case, there are eligible measures counterbalancing the lack of confrontation with the defence. In other terms, either the ban of unchallenged decisive testimonial statements rules without exception, both at trial and at the appeal, or, if some exceptions is permitted, they should work at both stages when “compensating measures” are provided for. At most, there may be room to differentiate the nature and content of the compensatory tools between trial and appeal phases (...)”.

¹¹⁰ECtHR, Kashlev v. Estonia of 26 April 2016, par. 39-43. Lorefice v. Italy of 27 June 2017.

¹¹¹ECtHR, Kashlev v. Estonia of 26 April 2016, par. 48 and 51.

¹¹²ECtHR, Kashlev v. Estonia of 26 April 2016, par. 49.

¹¹³ECtHR, Dan v. The Republic of Moldova n. 2 of 10 November 2020.

(...)"

To review the fairness of the new appeal judgment celebrated after the 2011 sentence the Court condemns the Republic of Moldova for the second time. On this occasion the European judges sanction the unfairness of the trial due to the fact that not all the decisive witnesses had been heard again in the appeal process and even those re-examined had provided conflicting versions with respect to what they testified during the first instance of judgment¹¹⁴. The procedural failures are numerous and do not end with a relative conviction by the Moldovan authorities and, as the ECtHR itself has explicitly reported, the Al-Khawaja test in the context of procedural fairness. Instead in the Kashlev case the compensations were a reference "copied" from the Dan case n. 2 where the use of the counterbalancing test was cleared by customs. This pronouncement showed the capacity of the compensatory logic by emphasizing the main instrument where the European judge has managed the questions of equity, moving away from the axiological one which includes procedural guarantees.

Balancing and compensatory approach

The counterbalancing test, as we have seen in the jurisprudence of compensations, shows the need to safeguard further interests involved in the process. The ECtHR has remained in the logic of

¹¹⁴ECtHR, Dan v. The Republic of Moldova n. 2 of 10 November 2020.

balancing and elaborating on the subject which identifies the balance between the needs of justice, the protection of the individual, and human rights according to the principles of ECHR (Rainey, Wicks, Ovey, Jacobs, 2021). As early as *Al-Khawaja and Tahery v. United Kingdom* case the balance was not an indispensable factor regarding the control and the essence of the compressed rights (Hoyano, 2014). Compliance with the guarantees of balancing derived from the relative application of the principle of proportionality which represents the essential component of a balancing test logic (Jackson, Summers, 2012; Daniele, 2014)¹¹⁵. It is not a matter of a restriction of procedural safeguards but of a relative annihilation of two clearly different operational poles. The course inaugurated in the *Al-Khawaja* case highlighted a limit of a right that seems to no longer exist. The related minimum rights are already qualified by the ECHR itself and have balanced against other interests that are considered to be competing. There is a massive reference to the need to protect victims which has remained for centuries on the margins of the criminal process as a sort of retaliation and of excessive valorisation. Equally massive is the call relating to the valorisation of the relative public interests that have to do with repressive criminal phenomena. From a technical-procedural

¹¹⁵“(...) to find the framework of the Court’s reasoning about art.6(3)(d) ECHR in a general principle, conceived with the intent to rationalise the balance between conflicting values: the so-called principle of proportionality, which is often applied by the European Court although it is not always explicitly mentioned (...)”.

point of view, the coverage of needs finds space in the relative comprehensive evaluation of the ECtHR, making explicit reference to the need to safeguard this type of interest. The reference helps to consolidate the idea that directly has to do with compensation where the equity check is not connected with the assessment of an injury but continues the analysis of the impact of this whole procedure. The public-repressive interests represent more important factors than the relative change in an act in the case-law of the ECtHR on equity as a requirement that seeks to protect the interests valued by a rigorous application of procedural rights. The victim of public interests translate into various expressions as an integral part of the compensations. Compensatory screening is the means whereby the ECtHR attempts to justify injuries as specific equity rights. The possibility of minimal defenses through recourse to compensation seems to admit that the protection of victims and public interests is an end in itself of the process. The defensive rights provided for by par. 3 of Art. 6 ECHR do not assume an autonomous value but represent purposes often degraded to mere components of the overwhelming and specified notion of fairness which limit themselves to originating the dependent facts of an often regressive perspective¹¹⁶.

¹¹⁶ECtHR, Ibrahim v. United Kingdom of 13 September 2016, par. 251: “(...) those minimum rights are not aims in themselves”, sustained in par. 262, that “in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 par. 3 rights as specific aspects of

We can say that balancing presents itself as the enlargement of these interests which necessarily passes through the dismantling or watering down of the relative defensive guarantees. This belief is based on the equivocal existence of a conflict between the rights of defense and the correct administration of justice (Hoyano, 2014)¹¹⁷. The development of a neo-inquisitorial antagonistic and destructured system runs counter to this type of balancing. Certainly it appears irrational and misleading that the ECtHR calls to protect the individual from repressive public interests, pressures and arbitrariness of the state.

“(...) By definition, any treaty for the protection of human rights gives priority to rights. Its goal is to protect certain individual fundamental interests not only from arbitrary state power but also from collective interests. So, although accurate, it sounds somewhat strange to say, as did the former president of the “ECtHR Rolv Ryssdall, that [t]he theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the” community and the protection of the individual’s fundamental rights. (...) one should expect that the rights convention itself reflects such a balance, the outcome of which must be that human rights are to be protected before other interests are even taken into consideration. If that is so, what does it mean to say that the issue is to strike a further balance between the general interest of the community and individual rights? (...)” (Miles, 2016; Sudre, 2021; Villiger, 2023)¹¹⁸.

the overall right to a fair trial rather than ends in themselves (...) the absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention (...)”.

117“(...) the predilection for “balancing” which now infects judicial analysis of art.6 in both Strasbourg and the United Kingdom is fundamentally misconceived, reflecting a profound misunderstanding of the right to a fair trial. It sets up a trap which assumes conflict between rights: defence rights are always seen in antithesis to those of the prosecution which represents the overarching public interest. It conflates defence interests with defence rights, and likewise those of other participants”.

118ECtHR, *Soering v. United Kingdom* of 7 July 1989, par. 89: “(...) inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (...)”.

In *Al-Khawaja and Tahery v. United Kingdom* case judges Sajò and Karakas affirmed that:

“(...) article 6 par. 1 and 3 (d) exist in the context of an inherent power imbalance between the accused and the state. The impetus behind Article 6 is the premise that the interests of justice will not properly safeguard the accused against the dangers of an unfair trial and improper conviction. Because prosecutorial power is subject to abuse as well as to the bureaucratic pressure to single out and punish a perpetrator, the defence should not be unduly impeded in countering the state’s allegations. It is sometimes said that the defendant’s rights must be “balanced” against the public interest in administering justice, and in particular against the Convention rights of victims and witnesses (...) the defence’s rights, including the right to examine adverse witnesses, is already embedded as fundamental to a fair trial in the administration of justice, prior to such considerations (...) out paragraph 3 rights this meant that these basic rights of the defence were necessary to counterbalance the dominant power of the prosecution, in the interests of fairness. To balance these rights a second time against the interests of the administration of justice, as the Government have sought to do in *Al-Khawaja and Tahery*, is to give the prosecution and the interests of administering justice (namely, to punish) a clear advantage. This Court has never held that “Article [6 par. 3 (d)] is simply an illustration of matters to be taken into account in considering whether a fair trial has been held” as Waller LJ claimed, reviewing Strasbourg case-law in *R. v. Sellick and Sellick* [2005] EWCA Crim 651, quoted in *Horncastle and others*, paragraph 79 (...)”¹¹⁹.

This tendency explains the peculiar identification of the nature of the system of the ECHR as an instrument of international treaty law. The ECtHR lends itself to its role as an international and super partes judge who is sensitive to the interests of the individual state parties where the criminal law is represented through nationalisms of an identity nature that spread:

“(...) when political drives push strongly toward new forms of nationalism, international institutions cannot but reflect such trend (...)”¹²⁰.

¹¹⁹See the dissenting opinion of judge Sajò and Karakas in case: *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

¹²⁰See the dissenting opinion of judge Sajò and Karakas in case: *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

(Follows): A syncretic approach

Balancing is presented auxiliary in the counterbalancing test according to a holistic evaluation of the taken together approach. Based on article 6, par. 1 and 3 ECHR (Villiger, 2023) the formalization of specific guarantees tend to assess the impact of the violation that is reported on the whole process that uses the compensation test (Hoyano, 2014). These approaches represent a tool that is effective for managing complex issues with shadows that ask for clarity on the sector of procedural fairness both from a theoretical and a critical point of view, such as unsatisfactory theories that only jurisprudence can resolve and shed light on.

The taken together approach as an interpretative method aims to evolve the guarantees of procedural fairness from a theoretical-general point of view (Harris, O'Boyle, Warbrick, 2023)¹²¹. This type of syncretic approach based on Art. 6, par. 3 ECHR is not sufficient to legitimize the hybrid operation of other solid argumentative bases. This syncretic approach suggests its own formulation which is not so demonstrated and analyzed through the jurisprudence of the ECtHR (Goss, 2016)¹²². Why do we say

¹²¹“(…) criminal cases, the “fair hearing” guarantee has to be read together with the specific guarantees in Article 6(2) and (3). Whereas the latter are subsumed within the former, the general guarantee of a “fair hearing” in Article 6(1) has elements that supplement those specified in Article 6(2) and (3) (...)”.

¹²²“(…) incoherence and lack of explanation (characterises the Court’s “taken together” approach (...)”.

this? The ECtHR does not specify the joint assessment if the individual parts of Art. 6 ECHR maintain their own autonomy of a total nature. It limits itself to asserting the relationship of the notion of equity by stating that the regulatory provisions must be considered together. This exegetical position is unsatisfactory. Every probability is linked to the European judge to provide a precise dogmatic content as minimum rights provided for in par. 3 rather than interpreting the specific guarantees so as to give them a more precise definition. The Court seems to prefer to leave Article 6 in a cloud of ambiguity. The resulting tendency is not to examine in itself respect for a specific right

“but to combine at the outset the specific guarantees with the general right to a fair trial and to deal with them together with out proper distinction”.

This criticism leads to a static interpretation of Art. 6 ECHR and highlights the problem of *littera legis* as well as the need to get away from it by building a solid and coherent theory of control. This exegesis is rigorous by the standard and specifies the evolutionary interpretation of ECtHR as well-defined limits (Greer, Gerards, Slove, 2019)¹²³. The tendency to combine two guarantees of equity control seems to compromise the normative autonomy of Art. 6, par. 3 ECHR. The syncretism between specific guarantees is resolved by a real evaluation of the

¹²³ECtHR, *Feldbrugge v. The Netherlands* of 29 May 1986: “(...) an evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in light of modern-day conditions, but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the Member States of the Council of Europe (...)”.

transformation of the overall fairness to each individual protection provided for in Art. 6, par. 3 ECHR (Trechsel, 2006; Goss, 2016)¹²⁴. The relative specific rights are an example of the fairness of a nature that contributes to weakening its preceptive effectiveness. This reconstruction leads to a simplistic reading of Art. 6 ECHR (Goss, 2016). An approach that reduces the notion of procedural fairness and limits itself to asking whether the intended process is complex and of a fair state (Goss, 2016)¹²⁵.

This demonstration can be seen in the *Ibrahim v. United Kingdom* case:

“(...) evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 par. 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 par. 1. However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceeding (...)” (Fikfak, 2019)¹²⁶.

This distrust of procedural guarantees pre-establishes the connection with the notion of fairness¹²⁷.

¹²⁴According to Trechsel: “(...) policy of blurring the application of paragraphs 1 and 3 of Article 6 (...)”.

¹²⁵“(...) reduces the provisions of Article 6(1), Article 6(2), Article (3)(a)-(e) to a two-word “fair trial” guarantee (...)”.

¹²⁶ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 251. Mayzit v. Russia of 20 January 2005, par. 77 “(...) the specific guarantees laid down in Article 6 par. 3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Article 6 par. 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings (...)”.

¹²⁷ECtHR, *Salduz v. Turkey* of 27 November 2008, par. 50 ss.). See also the separate opinion of judge Sajò in ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011 affirmed that: “(...) the reliance on Article 6 par. 1 in the

Equity rights appear to suffer several vulnerabilities. This teleological application risks relativizing contents with a binding nature of the rights protected by par. 3 of Art. 6 ECHR. This recalls a vision that reassures the law that legitimizes different and unpredictable concepts of fairness that are required to consider the interests and rights of the accused deriving from the public interests of the repression of crimes in connection with the protection of victims or witnesses.

The “as a whole test” evaluation

The holistic approach appears in the very idea of procedural fairness of Art. 6 ECHR (Caianiello, 2017). Equity as justice represents the main tool that carries out a control of Art. 6 ECHR which is equitable. The ECtHR was based on a:

“(...) attitude that considers the process in its innate practical aspect, as a phenomenon animated by the action of its protagonists (...). The evaluation “as a whole” is also one in which (...) most of the critical issues of the control system on compliance with procedural fairness are discharged (...)” (Caianiello, 2017).

The essence of the specific rights of Art. 6 par.3 ECHR includes strict applications of equity rights which more sharply defines a certain guarantee, i.e. the sun or decisive rule (Salduz rule). Its use is oriented towards regressive dynamics based on the protection of defensive guarantees that go beyond this type of limit (Hoyano, 2014). The holistic approach verifies the impact

interpretation of the right to counsel was dictated by the needs of an extensive interpretation of the specific right at stake (...)”.

of a violation on the overall fairness of each proceeding that avoids automatism and an interpretation that is pre-established by the guarantees of fairness and is adaptable to the specific case. The sifting of a perimeter nature lends various oscillations to similar procedural issues that derive from solutions opposed to a different evaluation of the elements in context. This kind of control constitutes a weakness. The ordinary structure is like an unpredictable element of outcomes that lead to compromising consistency in procedural matters (Goss, 2016)¹²⁸.

The “as a whole test” provides an explanation through jurisprudence that clarifies the proper functioning of the assumptions and the selection criteria. This type of element inserts the limits of its use into the evaluation (Trechsel, 2006; Helfer, 2020; Mariniello, 2021)¹²⁹.

The sentences of the ECtHR merely postulate the need for evaluation of the process as a whole regarding the impact of a lesion on the whole process (Goss, 2016). Comprehensive control is a subjective, discretionary judgement, conditioned by an effective impediment which foresees its outcomes ex ante

¹²⁸“(…) this ambiguity risks creating a perception that the Court could choose which way it applies the “proceeding as a whole” test in order to reach a particular result in a particular case. That ambiguity is exacerbated when the “proceedings as a whole” test is combined with the “taken together approach” (…)

¹²⁹See also the separate opinion of judge Pinto de Albuquerque in case: Murtazaliyeva v. Russia of 18 December 2018, par. 70: “(…) this approach entirely neglects legal certainty in favour of equity (...) is nothing more than a blank cheque for the domestic courts to do whatever they want with Article 6 par. 3 rights and for the Court to confirm the outcome of the proceedings (...)”.

(Goss, 2016). The ECtHR has moved away from the *littera legis* and is not consumed with conveying the exegeses to the innovation of a content with certain guarantees that teaches a theoretical relativism that introduces worrying and uncertain rates of discretion.

This relativism is covered by a type of evolutionary interpretation that implies even spasmodic attention to the concreteness of the judicial events taken into consideration to create the evolution and harmonization of conventional law pre-established by the ECHR.

Each story is peculiar and does not facilitate the authentic, rational and evolutionary path (Trechsel, 2006)¹³⁰. Through the “as a whole test” the seriousness of the violation is evaluated. It is focused on the entire procedure which represents a significant element as an index of the consideration that the ECtHR has the minimum rights according to Art. 6, par. 3 ECHR, i.e. an axiological conception of the relative guarantees of a teleological view. Thus the fairness control is a rigid formality of certainty and predictability of textual and content constraints which takes the form of a concrete screening of the violation of a guarantee on the fairness of a proceeding which considers its

¹³⁰“(...) each judgement decided by the Court has two aspects: one concerns justice for the specific applicant, the other concerns the development of the Court’s jurisprudence. Here, the latter is neglected to such a degree that the Court’s methodology must be criticized (...)”.

entirety¹³¹. This violation of the rules of ECHR, and as a consequence the infringement of a specific guaranteed right, is in itself sufficient to create a sort of overall unfairness of the proceeding (Hoyano, 2014; Caianiello, 2017)¹³².

Procedural guarantees and counterbalancing tests

Through the counterbalancing test we see the particular form of control of the fairness and unfairness of the proceeding in question. In this way the procedural guarantees are filtered and do not lose the rigid, pre-established and predictable character of the continental legal tradition, that is the object of various modulations. A precise determination is found in the concrete case, allowing the procedural rules and the specific needs to lose guarantees, and as a consequence making the content uncertain and less predictable (Caianiello, 2017). The protection of concrete dimensions involves a relative effect, i.e. a problem for a coherent and mature development of procedural fairness. Offsets risk hindering the need to guarantee concrete effective and not theoretical or illusory rights¹³³. Such a mechanism justifies various compressions of the procedural guarantees which determine recombinations of the individual protections

¹³¹ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011, par. 118-119. *Schatschaschwili v. Germany* of 15 December 2015, par. 100-101. *Ibrahim v. United Kingdom* of 13 September 2016, par. 257.

¹³²According to Hoyano: “(...) the entire proceeding must be unfair for a violation of Art. 6 (...)”.

¹³³ ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 272.

that at times have a regressive nature. The effectiveness and non-illusion seems to be less vulnerable in the face of a compromise that the assignment as subject of an enjoyment of minimum rights constitutes the main purposes of the provisions of Art. 6, par. 3 ECHR.

Minimum procedural rights affect the ability of systems to comply with the guarantees protected by the ECHR precisely contained in the national laws of the Member States (Jackson, Summers, 2013). The internal judges are applicators of the ECHR. They find it, however, difficult to define the exact content of the procedural rights that are provided for by Art. 6 ECHR. Process fairness serves the ECtHR as an “as a whole test” with compensatory assessment that assumes the process in its entirety. An agnostic approach, that respects the discipline of the ECHR in the face of the unpredictability that entails the fairness of each proceeding, includes the guarantees that protect the alignment of the discipline of the ECHR (Caianiello, 2017)¹³⁴.

¹³⁴“(…) this approach potentially can lead national jurisdictions to adopt an agnostic and inactive attitude toward the Convention. If there is no way to predict what specifically matters for the fairness of the proceedings, it is useless trying to align national systems to the echr requirements, because they remain in the end, too much unpredictable. In such a scenario, it might be far less burdensome for the Member States to leave their system as they currently are; and think that it is easier to autonomously develop rules of criminal procedure only according to their own needs, simply “paying a fine” whenever the ECtHR finds that some conviction was unfair, according to the ambiguous and erratic terms of Article 6 (...)”.

Compensating factors and nascent issues

The first aspect is represented by the elements of confirmation, i.e. the so-called corroboration which has to do with the compensatory function which respects the use of pre-trial statements that are collected from subjects in which the defense has not compared¹³⁵. The corroboration has a demonstrative value that excludes the decisive value of the relative unilateral declarations as decisive value. It is a testimonial function that builds a system that is valued to the maximum, recovering the compensation factor¹³⁶. We can characterize as improper the compensatory corroboration that balances the injury caused to the defense rights and limits the prognosis of the non-essentiality of the reliability of the proof confirmed by the findings. The compensatory use conditions of minimum defensive rights of the reliability of a piece of evidence as a minimum guarantee (Hoyano, 2014)¹³⁷.

¹³⁵ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011. *Schatschaschwili, v. Germany* of 15 December 2015, par. 128. *Ibrahim v. United Kingdom* of 13 September 2016, par. 274 lett g. *Chernika v. Ukraine* of 12 March 2020, par. 67.

¹³⁶ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011: "(...) where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive (...)".

¹³⁷"(...) the freestanding right of the defence to participate fully and effectively in the trial, irrespective of the strenght of the prosecution case, has become invisible (...)".

In *Al-Khawaja*¹³⁸, *Schatschaschwili*¹³⁹ and, to the following cases (*Schabas*, 2015; *Liakopoulos*, 2019)¹⁴⁰ it was stated:

“(...) a possible counterweight to the decisive use of the evidence unilaterally collected in violation of the right to confrontation is represented by the fact that the national magistrates had evaluated these findings with particular prudence and attention, providing detailed reasoning as to why they considered that evidence to be reliable (...)”¹⁴¹.

These are guidelines that we have also seen in the *Kashlev* case which affirms the renewal of a preliminary hearing in the overturning case as a sentence of a compensated nature and motivation which reinforces and emerges the precise and accurate assessment that the appellate judge decided by national law¹⁴².

The problematic doubts have to do with the extreme caution of the evaluations of the criminal judge who presents himself as a pre-condition in his own action which carries out its role with certain defaillances in relation to the procedural guarantees. The criminal judge examines the issues relating to attention with the utmost rigor and accuracy. Obviously, the compensatory effect of such circumstances is completely unproven. The compensatory measures heal the handicaps caused in the defense of the lesion of a guarantee that fails to understand how the loss of a minimum defensive right can counterbalance with

¹³⁸ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011, par. 161.

¹³⁹ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 126.

¹⁴⁰ECtHR, *Gani v. Spain* of 19 February 2013, par. 48.

¹⁴¹ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 126.

¹⁴²ECtHR, *Kashlev v. Estonia* of 26 April 2016, par. 48.

the careful or no scrutiny of the criminal judge characterizing one's own actions.

The ECtHR maintained the adversary character envisaged for the procedure and relative to the *deminutio* suffered by the accused. From the *Schatschaschwili* case the ECtHR:

“(...) counts the possibility of providing one's version of the facts among the remedial factors of the violation of the right to confrontation (...)”¹⁴³. This element seems to be able to compensate, albeit together with other factors, the non-renewal of the test followed by a change of the judge (...)”¹⁴⁴. This is also found in *Ibrahim*, in which the Court underlines, among the factors with compensatory scope, the fact that the accused has been given the opportunity to challenge the authenticity of the evidence and oppose its use (...)”¹⁴⁵.

The counterbalance has the possibility for the accused to prove and provide the relative version of the facts and to exercise the right to the contrary proof which moves away from disturbing scenarios for the protection of the fundamental rights of the accused. The compression of an essential prerogative for the accused has been remedied through the faculty to exercise one's own fundamental rights entailing thus a relative sclerotic effect in the procedural system as a paradoxical inversion of the values of the fundamental guarantees. This reconstruction is a basic guarantee that respects and guarantees the protection of others entering the “family” of compensation (Caianiello, 2017)¹⁴⁶. The

¹⁴³ECtHR, *Schatschaschwili*, v. Germany of 15 December 2015, par. 131. *Aigner v. Austria* of 10 May 2012. *Gani v. Spain* of 19 February 2013, par. 48.

¹⁴⁴ECtHR, *Chernika v. Ukraine* of 12 March 2020, par. 67-68.

¹⁴⁵ECtHR, *Ibrahim v. United Kingdom* of 13 September 2016, par. 274.

¹⁴⁶“(...) far from representing a compensation of any sort, such measures consist of further additional protections that are strictly necessary to make criminal proceedings fair. Actually, their relevance, as such, is perhaps so important that also the lack of these measures alone might cause the proceeding to be unfair (...)”.

protection of the accused undergoes a metamorphic development which assumes an indirect efficacy contra reum. The presence justifies the relative vulnerability of other defensive garrisons. The logic of the European judge to such reasoning is quite worrying given that an accused has enjoyed the right to speak in his trial and is one of the elements that compensates the possibility of examination by the main accuser. The possibility of providing the version of the facts represents a compensatory element that causes a side effect, a weakening of the principle that lies in the charge of the relative accusation. The decisive use of untested evidence and the investigative bodies will be partially exempt from their demonstrative obligation and the doubt is not an “ace in the hole” in favor of the defendant and could not be limited to making a passive demeanor during the proceedings against him. The reference to the possibility of providing the relative version of the facts to exercise the right to cross-evidence reverses the rule according to which it is the accuser's responsibility to gather elements on which to build the indictment. In its place, a principle is introduced according to which the accusatory thesis (based on a “weak” element) is strengthened because the counter-proof has not been provided. The irresistibility of the prosecution's prospects seems to derive from the lack of activation of the accused. The factors identified for this purpose, in fact, on the

one hand, do not offer any surplus of protection with respect to that generally guaranteed, on the other hand, they do not even take the form of additional guarantees to the minimal ones which must be recognized from the outset in order for a process can be defined as fair. There is a dynamic that, as mentioned, we could define as markedly recessive. With worrying frequency, in fact, the infringement of a right is considered compensated by the presence of another fundamental guarantee which must in any case be recognized in order for the trial to be fair¹⁴⁷. In most cases, it is improper to speak of compensation given that the counterbalancing test seeks to remedy the effects of a negative nature and deriving from a failure to recognize a right which leads to the elimination of a guarantee in terms of defensive protections.

By doing recourse to the counterbalancing approach, the European judges limit themselves to postulating the need for the lesion to be compensated as part of the factors capable of neutralizing the negative effects emanating. The mechanism as it develops tries to analyze a compensatory logic that does not clarify the concrete functioning of the total operated (Goss,

147“(…) in cases where the European Court recognises that a potential violation has been neutralised, or counterbalanced away, the substance of the judgment often involves simply highlighting other rights to which the applicant was already entitled under Article 6. At the risk of oversimplifying, in these cases, the Court’s counterbalancing logic seems to be that while an applicant may have lost her right to x under Article 6, she has not lost her right to y, and therefore the violation of x may be forgiven (…) the Court’s references to counterbalancing mask an incoherent case law (...)”.

2016), therefore it is stated that it is important to note that the European Court does not set out a clear explanation of how the counterbalancing working. The circumstances in which counterbalancing may be conducted as part of Article 6 analysis, or the details of how such counterbalancing should be structured (Goss, 2016).

Concluding remarks

With the *Al-Khawaja and Tahery v. United Kingdom* judgment the ECtHR has reduced the relevant test, rectius value of the measurement of the incidence of injury of a guarantee that respects the fairness of the whole proceeding (the as a whole test). The complex of procedural fairness thus becomes a compensation for various violations of procedural rights according to Art. 6, par. 3 ECHR, as an advocate that counterbalancing represents a teratogenic form of a traditional approach of a holistic nature that the ECtHR carries out in the matter of procedural fairness.

The scenarios are varied, dark, regressive and defensive in nature. An axiological structuring seems to replace a teleological type that the notion of overall equity forces into continuous compromises of a regressive nature with other secondary and non-basic values or interests. The individual defensive guarantees are not values in themselves but are part of the

measure that contributes to guaranteeing the overall fairness of a proceeding with greater notion of public interests.

The individual guarantees in the name of a continuous and antagonistic balance with the related interests considered as a priority are efficient for justice and protection of the victim. The perimeter of the guarantees and the non-binding principle formulas take on a real consistency in the individual cases where the peculiarity is conditional. This type of excessive empiricism makes it clear that the inconsistency that characterizes the physiognomy of the ECtHR is an impartial judge and holder of the nomophilachy of the right of the ECtHR. Nomophilachy which acquires a particularly meaningful value and becomes a true nomopoiesis of nature which forces the ontological difference between the notion of precept and judgment, as a sort of unresolved mingling of a political-legislative function which distinguishes the work. The as a whole test, overall fairness, and compensatory guarantees are some of the concepts that allow the judge of Strasbourg to bring to a judgment of fairness not only a judicial but also a political act.

This context includes and arrives at the conclusion of an image that deforms the procedural guarantees particularly through the compensatory management relativising to its own content which becomes more uncertain and unpredictable. Compensations are not very theorizing. The ECtHR merely postulates the need for a

compensatory and enumerated examination of suitable factors which neutralize the negative effects from a violation. Most of the compensatory elements are identified factors that do not offer any surplus of protection that complies with a guaranteed general way and do not substantiate the additional guarantees and those that must be recognized in order for a process to become and be fair. On the contrary, the identification of these counterweights is revealed as a worrying frequency of an injury and of a right compensated by the presence of another fundamental guarantee which must be recognized until the counterbalancing test eliminates the passive guarantees in front of the defensive safeguards.

The interpretative paths of the jurisprudence of the ECtHR do not represent a single possible alternative to a coherent textual data according to the spirit of the ECHR. In *Nielsen v. Denmark* case (Safferling, 2012; Settem, 2015; Kostoris, 2018)¹⁴⁸ it provides a precise interpretation of the structure of the equity judgment according to Art. 6, par. 1 and 3 ECHR with autonomous mode. The “as a whole test” comes at a later time detecting violations of Art. 6, par. 3 ECHR as well as verifying during the whole procedure other elements that are in contrast with the specific rights and in some way affect the overall fairness of the procedure. The orientation is the opposite of that

¹⁴⁸ECtHR, *Nielsen v. Denmark* of 15 March 1960, par. 52.

ruling just quoted given that in the Nielsen case the entire process was aimed at factors of iniquity on the respect of the rights which are considered as such. In the current jurisprudence there is no screening of rights which are considered without intermediation of the test to verify the course of the proceedings, i.e. elements where the violation of the plaintiff complains. This interpretation precisely demonstrates today's interpretative approaches in the field of procedural fairness which are not the only possible ones, such as an unavoidable rate of elasticity not so much of the ECHR but of the ECtHR itself in relation to plausible and desirable guarantees.

The founding elements of the structure and contents of the assessment of procedural fairness regarding the minimum guarantees, which are provided for by Art. 6, par 1 and 3 ECHR, are a stock of teaching that is proposed by the Nielsen case given that we have returned to evaluating the respect of the minimum rights that are sanctioned autonomously by respecting the notion of their overall fairness. The aims are the liberation of the guarantees of fairness of a system of overall fairness assessment which returns to the respect of the individual guarantees, as relativised and as a filter of the notion of fairness. On a global assessment of the entire procedure, recourse is made to a first screening which excluded the violation of a specific right which verifies the circumstances that do not directly lead

to a violation of guarantees of Art. 6, par. 3 ECHR and are affected by a fairness of Art. 6, par. 1 ECHR. It is a holistic approach that recovers a guarantee dimension for the accused who prohibits a use in *malam partem* for compensatory purposes. The system of the ECHR tends to come out with automatism and attempts a connection between the infringement of a right and its own proclamation. These guidelines place the ECtHR as a re-appropriated witness in procedural matters where the role of the judge of rights overcomes the exasperated relativism of every condition of its own jurisprudence.

The jurisprudence examined up to now has made us recognize the relative value of an approach that allows the achievement of non-negligible results. Overall, Art. 6 ECHR has acquired a very strong value over time and has satisfied the principle of legal certainty by avoiding excessive discretion in the interpretative sector which drastically decreases the possibility in national legal systems of “running” to continuous violations of the ECHR due to an excessive shortcomings and vagueness of the counterbalance test.

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